NORTON ROSE FULBRIGHT

Liability schemes in outsourcing and technology contracts

A global benchmark

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A key question customers and suppliers will always want answered about their outsourcing and technology contracts is whether the position they have reached on liability is *market-standard*.

To help them answer that question, we have undertaken a global survey of outsourcing, professional services, software (on-premises), software-as-a-service (SaaS), cloud and hardware contracts (the **contracts**) entered into between 2016 and 2021 across the globe (covering US, UK, UAE, Thailand, Switzerland, South Africa, Singapore, Japan, Germany, France, China, Canada, Brazil, Austria and Australia).

Where we refer to contracts in those locations, we mean contracts of customers based in those locations. The focus of the survey is the liability of the supplier, not the customer.

What the survey covers

Our survey enables customers and suppliers to benchmark their own contracts against market-standard on the basis of the following key criteria:

- What is current market-standard in relation to liability caps?
- What is the current approach to data-related liability caps?
- What losses are typically excluded or for which liability is unlimited?
- What is current practice in relation to suppliers giving indemnities?

The survey also looks at how things have changed since we last conducted a survey of these issues in 2015, considers some future trends, and makes some observations about the impact of the methodology we have used.

What are the key findings?

What is current market-standard in relation to liability caps?

- Across all regions surveyed, 48% of contracts cap the supplier's liability with an annual or 12 month cap, while 39% cap it over the entire term.
- More commonly than in other regions, UK contracts tend to provide for liability caps that calculate supplier liability on a more *granular* basis (for example, by carving up the contractual term and linking liability to a part of the total term and/or by linking liability to fees for a part of the term).
- In the US, 47% (a high proportion) of contracts use a monetary value/amount cap (compared with just 24% of contracts across all regions, and 25% in Australia, that do this), rather than a cap linked to a percentage of fees. In our experience, however, it is common for US and Australian contracts, for example, to set a monetary floor as well as a percentage cap (for example, "*the greater of $1M and %[100/200 etc] of the fees paid in the preceding 12-month period*") in order to provide for a sufficient liability pool for the customer to draw on in the early stages of a contract.
- Across all regions surveyed, 39% of contracts cap supplier liability at 100% of fees. However, a significant number of US contracts (29%) cap supplier liability at *less* than 100% of fees, just 13% of US contracts cap it at 100% of fees, 29% cap it at 200% of fees and a further 29% of US contracts cap it at *more than* 200% of fees. US contracts, more than contracts for any other region, accordingly show a bias for caps *at, or in excess of*, 200% of fees.

What is the current approach to data-related liability caps?

- The EU and UK contractual approach to data–related liabilities is *markedly more customer-centric* compared with the position typically taken in other jurisdictions. The impact of the EU General Data Protection Regulation (**GDPR**) is immediately apparent in this outcome.
- Just 9% of APAC contracts (and only 4.5% of Australian contracts) include a data-related liability cap (an outcome that many APAC and Australian customers may wish to revise in future contracts or renewals).
- Many UK contractual liability schemes provide for more *overall* data-related supplier liability (when compared with the US or APAC, for example), and typically are structured to avoid a situation where a general liability pool could be exhausted by a single large data-related claim.
- UK contracts, more often than the other regions (on average), prefer to use (in 44% of cases) data-related liability caps based on a *multiple of fees and a threshold (monetary) value*. (Use of such caps is useful in providing for a data-related liability pool – by virtue of the threshold monetary value – available to the customer in the early stages of a contract term).
- US contracts have the *lowest* data-related liability caps expressed as a monetary value. (Given regulatory initiatives in some US states – for example, California's *Consumer Privacy Act* – to enact data protection legislation, US customers may wish to revisit this position in future contracts and renewals).

What losses are excluded or for which liability is unlimited?

- The impact of the GDPR is apparent in how contracts falling within its ambit deal with excluding or limiting supplier liability for losses related to data (such as loss, corruption or destruction of data) and loss of use. In such cases, customers have been *more successful* in resisting supplier efforts to exclude or limit liability.
- Contracts in the APAC region take an intermediate position between the UK (supplier liability for data-related losses and loss of use typically not excluded) and the US (such losses typically excluded). The hybrid position of APAC contracts is true not just in relation to liability, but also in relation to many of the other data points in the survey. This is surprising, given that the English common law heritage of many countries in the APAC region (for example, Australia and Singapore) might lead one to suppose that APAC would be more closely aligned to UK positions, but it is not generally borne out by the data.
- Many US and APAC contracts exclude supplier liability for indirect, consequential or special damage, on the one hand, but do not exclude supplier liability for loss of profit, on the other. In some jurisdictions, such as the US, loss of profits is typically regarded by the courts as indirect or consequential, which may be driving this tendency. That is not necessarily the case in English law, which is why UK contracts tend to exclude both consequential loss and loss of profit.
- When compared with the other regions, UK contracts more often exclude supplier liability for particular heads of loss – the approach is typically *more granular*, and favours suppliers.
- Regional differences as to the types of losses for which suppliers accept unlimited liability sometimes reflect *local law differences* in relation to the treatment of particular losses.
- US contracting norms in relation to unlimited supplier liability for gross negligence are beginning to be reflected in the contracts in other common law jurisdictions. In some cases, this is because US contracting templates have been adapted for use in those jurisdictions.
- Few contracts *specifically disapply* liability caps to service credits and liquidated damages. (Contracts should ideally address the issue explicitly one way or the other).
- The APAC region occupies a hybrid position between the very granular approach of UK contracts and more general approach of US contracts in relation to providing for unlimited supplier liability for particular losses.

What is current practice in relation to suppliers giving indemnities?

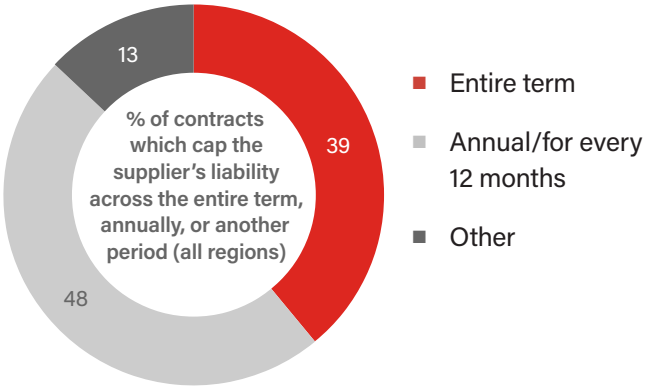
- Supplier indemnities are most common in US contracts when compared with the practice in all regions.
- Compared with all the regions, UK contracts typically include *more* supplier indemnities relating to data issues.
- Just 9% of suppliers across all regions cap liability of *all* the indemnities they give.
- The approach to capping supplier liability for indemnities is distinctly different in the US, when compared to all regions surveyed. The data show that suppliers under US contracts more readily prefer *consistency of approach* in relation to capping liability for indemnities, on the one hand, or leaving liability uncapped for indemnities, on the other. Accordingly, when compared with suppliers in other regions, suppliers under US contracts are more likely to agree that liability for *all* indemnities is unlimited, or that liability for *all* indemnities is capped.
- However, while suppliers under US contracts prefer such consistency of approach, they are far less likely (when compared with all regions) to agree to unlimited liability for indemnities.

Set out below are the detailed findings of the survey, supporting the conclusions set out above.

What is current market-standard in relation to liability caps?

Do suppliers typically cap their liability across the entire term, annually or by reference to another period?

Across all regions surveyed, 48% of contracts cap the supplier's liability with an annual or 12 month cap, while 39% cap it over the entire term.



The UK's approach is slightly different from the average, with a higher 71% of contracts capping the supplier's liability annually or 12 monthly.

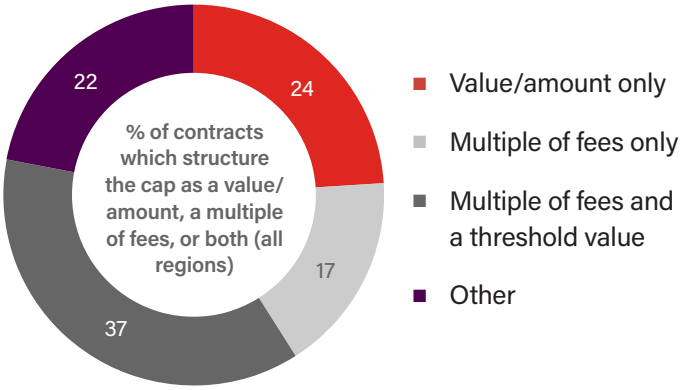
While the data do not readily suggest a reason for this difference in approach, the outcome is consistent with the approach taken in UK contracts in other areas examined by the survey (for example, in relation to data liability, discussed below).

More commonly than in other regions, UK contracts tend to provide for liability caps that calculate supplier liability on a more granular basis – for example, by carving up the contractual term and linking liability to a part of the total term and/or by linking liability to fees for a part of the term.

This is most obvious in intensively negotiated contracts and tends to favour customers, as it often expands the total liability of the supplier across the life of the contract.

Do contracts typically structure the supplier's liability cap as a value/amount, as a multiple of fees, or as both?

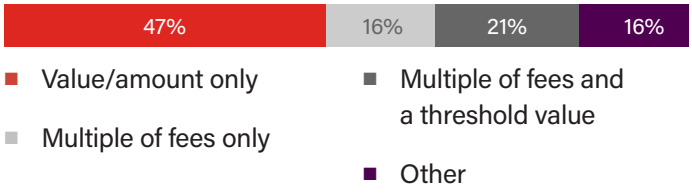
Across all regions surveyed these were the findings:



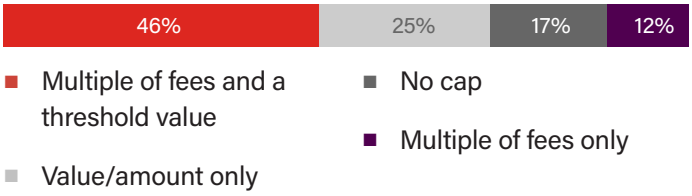
Contracts in the US do not follow this pattern.

In the US, 47% (a high proportion) of contracts use a monetary value/amount cap (compared with just 24% of contracts across all regions, and 25% in Australia).

US % of contracts which structure the cap as a value/ amount, a multiple of fees, or both



AUS % of contracts which structure the cap as a value/ amount, a multiple of fees, or both

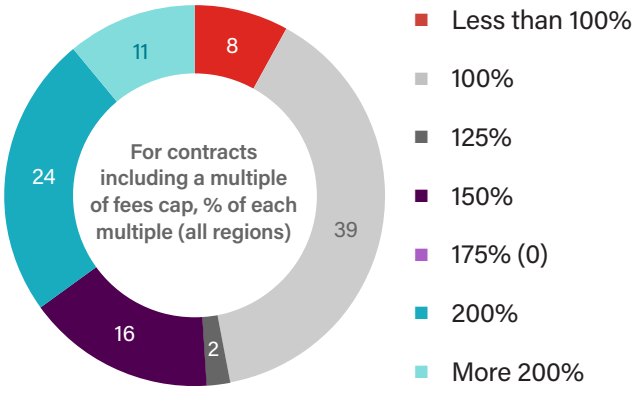


The virtue of the approach favoured by 47% of contracts in the US is that it is uncomplicated. While, technically, such a cap can have the effect of decoupling supplier liability from fees spent (with a potential downside or upside, depending on whether you are the customer or the supplier), in reality the cap agreed often reflects the parties' view of the likely total value of the contract.

In our experience, it is in any event common to set a monetary floor as well as a percentage cap in, say, Australian and US contracts (for example, *"the greater of $1m and %[100/200 etc] of the fees paid in the preceding 12-month period"*) in order to provide for a sufficient liability pool for the customer to draw on in the early stages of a contract.

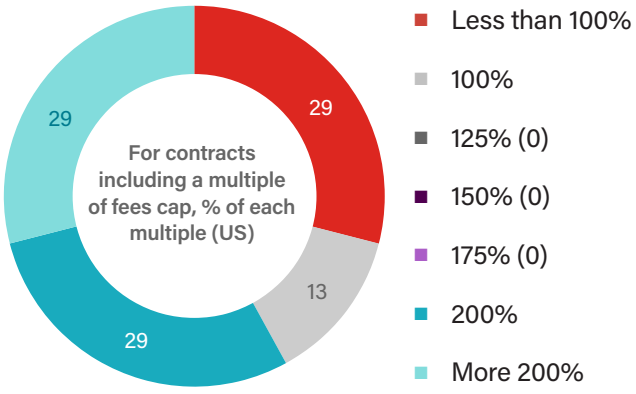
What is the typical size of supplier caps that are based on a multiple of fees?

Across all regions surveyed, 39% of contracts cap supplier liability at 100% of fees.



US contracts do not follow the profile average for all regions.

A significant number of US contracts (29%) cap supplier liability at *less than* 100% of fees, just 13% of US contracts cap it at 100% of fees, 29% cap it at 200% of fees and a further 29% of US contracts cap it at more than 200% of fees.



What is the reason for the disparity between the US approach to this and the approach elsewhere?

- The US data sample is not overly represented by contract types that might push the cap size up (such as public sector contracts).
- However, the data does include a greater than average number (when compared with all regions) of contracts on supplier standard terms, which is a factor that typically trends downwards in terms of supplier liability (for more detail, see *'Has our methodology impacted upon the findings?'*) This may explain why a significant number of US contracts (29%) cap supplier liability at less than 100% of fees.

US contracts, more than contracts for any other region, show a bias for caps at, or in excess of, 200% of fees. This is surprising, given the global size and strong bargaining position of many US suppliers.

What has changed since our 2015 survey?

- While in the current survey, across all regions surveyed, 39% of contracts cap supplier liability at 100% of fees, in the 2015 survey 62% of suppliers in contracts with financial institutions did this in their contracts (the findings are similar in other sectors in the 2015 survey).
- A comparison of the data in the two surveys shows that, since 2015, there is an increasing trend towards capping supplier liability *at greater than* 100% of fees.

What is the current approach to data-related liability caps?

The data reveals that the EU and UK contractual approach to data–related liabilities is markedly more customer-centric when compared with the position typically taken in other jurisdictions.

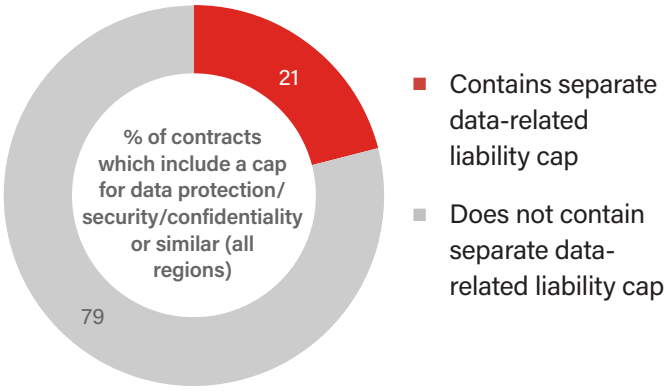
Given the impact of the GDPR on both the EU and the UK, it is not surprising that the survey data shows that the EU and UK contractual approach to data–related liabilities is markedly more customer-centric when compared with the position typically taken in other jurisdictions.

This is the case even though some of the countries surveyed (for example, Singapore, Australia and South Africa) have comprehensive data protection legislation. It seems that the potential for extremely high fines for breach under the GDPR has focussed customer attention on securing significant data-related comfort in relation to supplier liability for data, whether personal in nature or not.

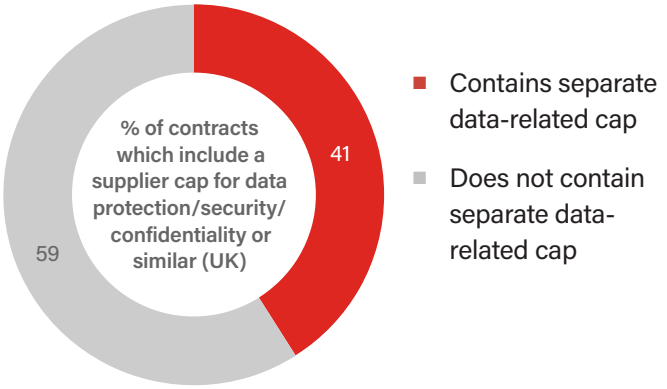
Do contracts typically include a cap for data protection, data security, confidentiality or a similar liability?

Across all regions, just 21% of contracts contain a separate liability cap for data protection, data security, confidentiality or a similar liability (a **data-related liability cap**). In this context, such a separate data-related liability cap might, for example permit the customer to draw on:

- *Separate pool of liability:* a separate (typically greater) pool of liability from the general liability cap.
- *Top-up liability:* the general cap as well as an additional pool of liability for data-related claims.



When compared with the US and the APAC regions, UK contracts show the greatest tendency to including a data-related cap:



While the impact of the GDPR is apparent in the UK data, the increased focus on data-related liability can even be seen in jurisdictions where the GDPR does not apply.

For example, the US contracts show more appetite for higher data-related liability caps when compared with both the average and APAC, with 32% of US contracts including such a cap:

Just 9% of APAC contracts include a data-related liability cap, which is an outcome many APAC customers may wish to revise in future contracts or renewals.

Many UK contractual liability schemes provide for *more* overall data-related supplier liability (when compared with the US or APAC, for example), and typically are structured to avoid a situation where a general liability pool could be exhausted by a single large data-related claim.

What is the most common type of data-related liability cap?

Across the regions surveyed, there is on average a relatively even preference for data-related liability caps that cap liability by reference to:

- A value (monetary) amount.
- A multiple (100%, 200%, etc.) of fees.
- A multiple of fees and a threshold (monetary) value.

% of contracts where the data-related cap is a value/ amount, a multiple of fees, or both (all regions)

37%
Value/amount only

26%
Multiple of fees and a threshold value

26%
Multiple of fees only

11%
Other

However, UK contracts more often than the other regions prefer to use (in 44% of cases) data-related liability caps based on a multiple of fees and a threshold (monetary) value:

% of contracts where the data-related cap is a value/ amount, a multiple of fees, or both (UK)

33%
Value/amount only

44%
Multiple of fees and a threshold value

22%
Multiple of fees only

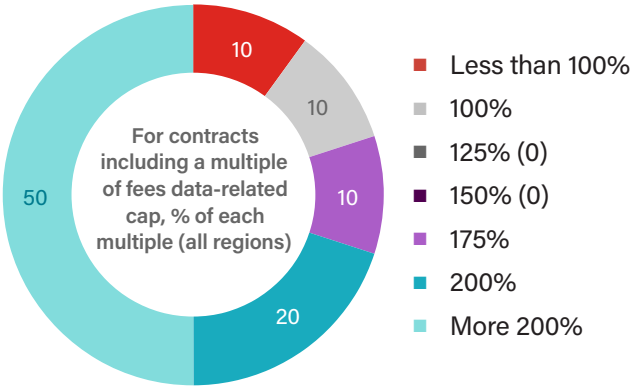
0%
Other

Such data again underscore the increasingly granular approach to data-related supplier liability in UK contracts.

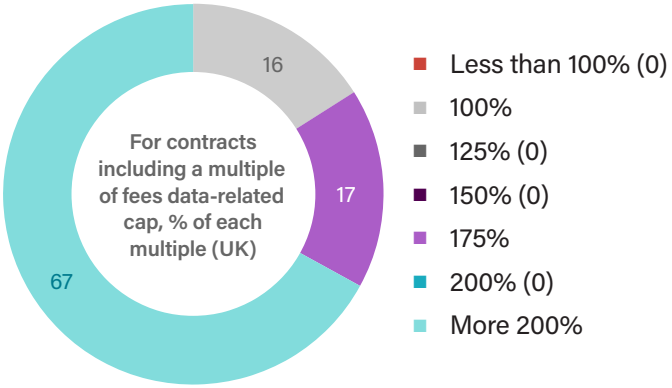
Use of such caps typically provides for a data-related liability pool (by virtue of the threshold monetary value) available to the customer in the early stages of a contract term (when data issues can be most acute, perhaps because of data migration or service take-on, but in circumstances where not many fees have yet been accrued).

What is the typical size of the data-related liability cap for contracts that have one based on a multiple of fees?

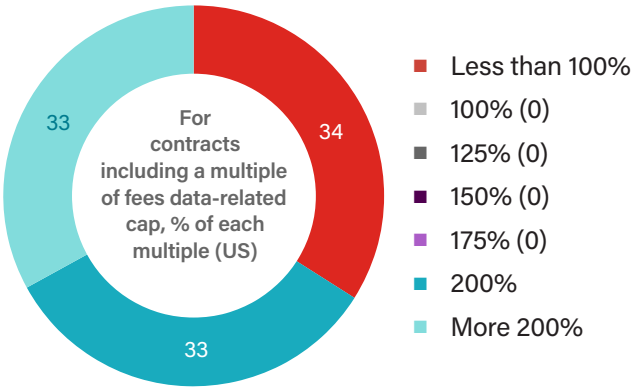
Across the regions surveyed, of the contracts containing a data-related liability cap expressed as a multiple (100%, 200%, etc.) of fees, 50% of them (a high proportion) provide for fees multiples that are greater than 200% of fees:



The preference for such an approach is even more pronounced for UK contracts containing a data-related liability cap expressed as a multiple (100%, 200%, etc.) of fees, where 67% of them (a very high proportion) provide for fees multiples that are greater than 200% of fees:



The approach is different in the US. Here – where the GDPR is not an issue – the survey data shows a more evenly spread approach in relation to multiples of fees for data-related caps:

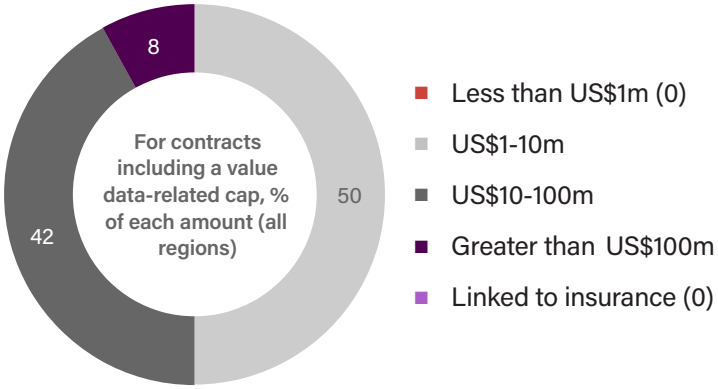


This position may change with the impact of California's *Consumer Privacy Act* and when other US state privacy legislation is enacted.

What is the typical monetary value of data-related liability caps where they are expressed as a monetary value?

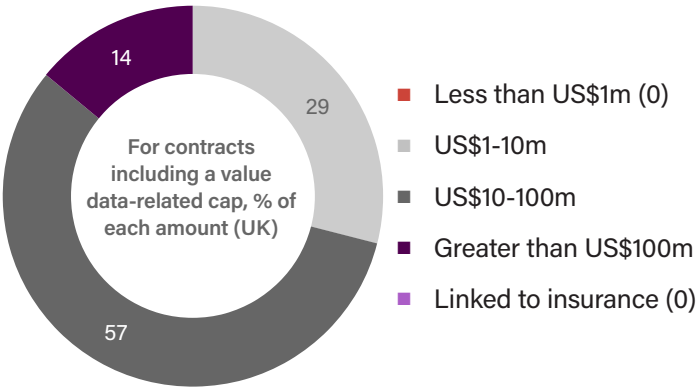
If spending under the contract is likely to be low, the customer may take the view that a data-related liability cap based on a multiple of fees may not provide it adequate protection for its data exposure. Here a customer may instead push for a data-related liability cap expressed as a monetary value. In such cases, the size of the value cap may often be linked to the supplier's insurance.

Across all regions in 50% of cases data-related liability caps expressed as a monetary value are between US$1-10m:

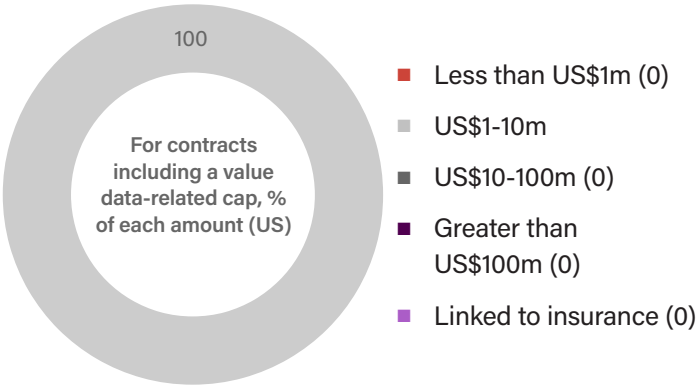


Reflecting UK concerns over the GDPR, the UK profile for the size of monetary values for data-related liability caps is quite different from the average across all regions. For example:

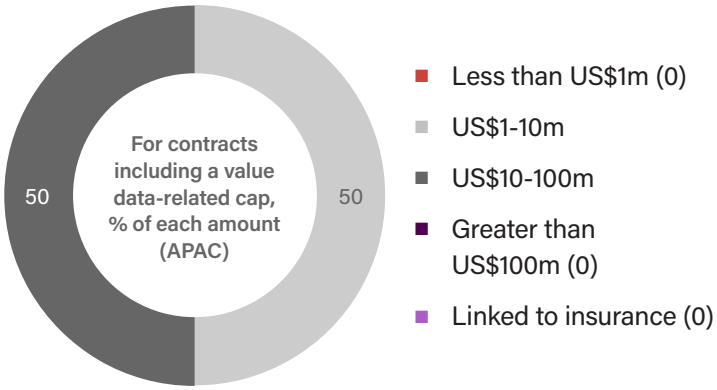
- Far more UK contracts (57%) contain a data-related liability cap of US$10-100m, when compared with all regions on average.
- UK contracts are the only data sample where a number of contracts (14%) have data-related liability caps in excess of US$100m.



US contracts have the lowest data-related liability caps expressed as a monetary value. Given regulatory initiatives in some US states (for example, California) to enact data protection legislation, US customers may wish to revisit this position in future contracts and renewals.



Perhaps reflecting that the region is increasingly enacting data protection legislation, contracts in the APAC region adopt an intermediate position between the UK and US in relation to data-related liability caps expressed as a monetary value. (This true of APAC contracts not just in relation to data-related liability caps, but also in relation to many of the other data points in the survey. This is surprising, given the English common law heritage of many countries in the APAC region (for example, Australia and Singapore) – a state of affairs that suggests APAC would be more closely aligned to UK positions, but not one generally borne out by the data).



What has changed since our 2015 survey?

- Perhaps indicating how far things have come in a short time, our 2015 survey did not collect data relating to data-related liability caps (although it did deal with other matters relating to data, discussed below).
- As noted elsewhere, the contracts in the current survey generally show an increasing sophistication in relation to the treatment of data.

What losses are excluded or for which liability is unlimited?

The impact of the GDPR is immediately apparent in how contracts falling within its ambit deal with excluding or limiting supplier liability for losses related to data (such as loss, corruption or destruction of data) and loss of use. In such cases customers have been more successful in resisting supplier efforts to exclude or limit liability.

To what extent do suppliers typically successfully exclude liability for particular losses?

The survey data shows considerable regional variation in relation to suppliers successfully excluding liability in relation to particular losses (often referred to as "heads of loss" in common law jurisdictions). Across all regions this was the position:

% of contracts containing supplier excluded losses (all regions)

7%	No excluded losses
86%	Indirect/consequential/special damages
65%	Loss of profits
42%	Loss of revenue
21%	Loss of anticipated savings
13%	Loss/corruption/destruction of data
32%	Loss of contract/business/business opportunity
25%	Loss of goodwill
15%	Loss of use
1%	Wasted expenditure
17%	Other

Data-related losses

It is very common now for technology contracts to treat losses related to data (loss, corruption or destruction of data, security breaches, confidentiality, and loss of use) consistently in terms of excluding/limiting losses and indemnification. Rather than applying a more granular approach in relation to the treatment of each individual type of data-related loss, technology contracts nowadays often reflect the reality that a breach of one data-related requirement will usually also be a breach of the others. Customers will often take the view that it simply does not make sense, commercially or technically, to treat them inconsistently. The also wish to avoid the kind of forensic inquiry that separate liability treatment might entail were different liability caps used in relation to essentially similar losses.

As might be expected because of the impact of the GDPR, UK contracts – more so than any other region on average – typically do not exclude supplier liability for losses related to data (in the terms used in the survey data points, here we mean loss, corruption or destruction of data, and loss of use):

% of contracts containing supplier excluded losses (UK)

5%	No excluded losses
91%	Indirect/consequential/special damages
91%	Loss of profits
64%	Loss of revenue
50%	Loss of anticipated savings
0%	Loss/corruption/destruction of data
86%	Loss of contract/business/business opportunity
73%	Loss of goodwill
0%	Loss of use
18%	Wasted expenditure
5%	Other

The UK position can be compared with the US, where supplier liability for:

- Losses related to data (loss, corruption or destruction of data) is expressly excluded in just 20% of cases.
- Loss of use is expressly excluded in just 26% of cases.

% of contracts containing supplier excluded losses (US)

0%	No excluded losses
54%	Indirect/consequential/special damages
46%	Loss of profits
20%	Loss of revenue
3%	Loss of anticipated savings
20%	Loss/corruption/destruction of data
6%	Loss of contract/business/business opportunity
11%	Loss of goodwill
26%	Loss of use
0%	Wasted expenditure
34%	Other

Contracts in the APAC region take an intermediate position between the UK (supplier liability for data-related losses and loss of use typically not excluded) and the US (such losses typically excluded).

Just 6% of APAC contracts exclude supplier liability for data-related losses (loss, corruption or destruction of data); and 9% exclude supplier liability for loss of use:

% of contracts containing supplier excluded losses (APAC)

11%	No excluded losses
83%	Indirect/consequential/special damages
40%	Loss of profits
31%	Loss of revenue
14%	Loss of anticipated savings
6%	Loss/corruption/destruction of data
11%	Loss of contract/business/business opportunity
23%	Loss of goodwill
9%	Loss of use
3%	Wasted expenditure
6%	Other

Because data protection laws in the APAC region continue to expand, we expect contracts in the APAC region will move more towards the UK/EU position as regards such exclusions.

Other losses

Many US and APAC contracts exclude supplier liability for indirect, consequential or special damage, on the one hand, but do not exclude supplier liability for loss of profit, on the other.

In some jurisdictions, such as the US, loss of profits is typically regarded by the courts as indirect or consequential, which may be driving this tendency. That is not necessarily the case in English law, which is why UK contracts tend to exclude both elements.

As regards supplier liability for other heads of loss (that is, non-data-related losses):

- *No losses excluded:* suppliers in 11% of APAC contracts exclude no losses at all (that is, suppliers rely solely on their limitations of liability rather than exclude particular losses).
- *Indirect, consequential, special damage:* while most UK and APAC contracts exclude supplier liability for indirect, consequential or special damage, this is less commonly the case in the US (just 54% of US contracts do this). This is surprising and may be the result of a number of different factors (for example, the use of customer templates not containing consequential loss exclusions where the supplier chooses not to push back).
- *Loss of profits:* suppliers under UK contracts consistently exclude liability for loss of profits (91%), compared with 40% in APAC and 46% in the US who do so. In some jurisdictions, such as the US, loss of profits is typically regarded by the courts as indirect or consequential. That is not necessarily the case in English law. As in the US, English common law provides that loss of profit can be direct or consequential, with the result that an exclusion of indirect or consequential loss under an English law contract may not be sufficient to exclude supplier liability for direct loss of profits.[1] However, English courts may be more likely to treat loss of profits as direct, as compared to US courts, which may help explain the findings.
- *Wasted expenditure:* while 18% of UK contracts exclude supplier liability for wasted expenditure, just 3% in the APAC region and none in the US do this. The concept of wasted expenditure as a "head of damage" is recognised under English common law, but where a local jurisdiction's laws do not do this, it is unlikely that a contract subject to that law would call it out for separate treatment.

1 *Hotel Services Ltd v Hilton International Hotels (UK) Ltd* [2000] 1 All E.R. (Comm) 750.

- *Other heads of loss:* UK contracts exclude supplier liability for loss of contract/business/business opportunity in 86% of cases, and for loss of goodwill in 73% of cases. The survey data reveals that this approach is generally less common in other regions.

When compared with the other regions, UK contracts more often exclude supplier liability for particular heads of loss – the approach is typically more granular, and favours suppliers.

To what extent do suppliers accept unlimited liability for particular losses (including under an indemnity)?

There is some similarly across the regions as to the types of losses for which suppliers accept unlimited liability:

% of contracts containing supplier unlimited losses (all regions)

12%	No unlimited losses
61%	Breach of confidentiality/confidence (including an indemnity)
54%	IP infringement
14%	Data loss/corruption/unauthorised disclosure/ breach of data protection or security (including an indemnity)
27%	Cannot be limited/excluded by law
44%	Fraud/fraudulent statement/fraudulent misrepresentation
44%	Deliberate/wilful abandonment/wilful misconduct
31%	Gross negligence
3%	Wrongful termination
57%	Death/personal injury
18%	Property damage
21%	Obligations to pay fees/service credits/liquidated damages
35%	Other

Regional variations as to the types of losses for which suppliers accept unlimited liability do exist.

Regional differences as to the types of losses for which suppliers accept unlimited liability sometimes reflect local law differences in relation to the treatment of particular losses.

For example:

- *Fraud, fraudulent statement, fraudulent misrepresentation:* the law in a number of jurisdictions provides that a party cannot, by contract, limit or exclude liability for fraud. For example, there is English common law providing that a clause seeking to limit a party's liability for its own fraud is void as a matter of public policy.[2] It is unsurprising, therefore, that 86% of UK contracts specifically provide that their exclusion clauses do not limit or exclude supplier liability for fraud (the average across all regions was 44%).
- *Deliberate/wilful abandonment, wilful misconduct:* the survey data shows that 74% of US contracts provide for unlimited supplier liability in relation to deliberate/ wilful abandonment or wilful misconduct. However, we urge caution in drawing conclusions from this data point, because US contracts typically focus on wilful misconduct (which itself has a different meaning in the US from that, for example, under English common law) and do not address liability in relation to deliberate/ wilful *abandonment* (contract abandonment being a concept of English common law). Historically, such provisions in UK contracts were uncommon, but the survey data shows that 41% of UK contracts now provide for unlimited supplier liability in such circumstances. Earlier English case law suggested that a party in "deliberate personal repudiatory breach" could not rely on an exclusion or limitation clause in respect of the breach (that is, it would have unlimited liability in such circumstances). However, more recent English authority suggests that there is nothing in principle stopping an appropriately worded clause from excluding or limiting a party's liability for deliberate or wilful breach.[3] While to be treated with some caution, we can tentatively identify a general trend that seeks to differentiate liability based on the severity of the breach or intention of the breaching party (wilful/deliberate acts, or the trend in relation to gross negligence, identified below).

2 *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6.
3 *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754.

% of contracts containing supplier unlimited losses (UK)

5%	No unlimited losses
68%	Breach of confidentiality/confidence (including an indemnity)
59%	IP infringement
18%	Data loss/corruption/unauthorised disclosure/ breach of data protection or security (including an indemnity)
59%	Cannot be limited/excluded by law
86%	Fraud/fraudulent statement/fraudulent misrepresentation
41%	Deliberate/wilful abandonment/wilful misconduct
23%	Gross negligence
5%	Wrongful termination
86%	Death/personal injury
5%	Property damage
27%	Obligations to pay fees/service credits/liquidated damages
45%	Other

However, despite regional differences in laws, sometimes there is consistency among the regions on some issues. For example, in relation to data loss/disclosure/breach of data protection law/breach of security (including indemnification), despite the impact of the GDPR on EU and UK contracting norms in relation to data, there is a surprisingly similar approach to unlimited supplier liability for data-related losses across the regions (for example, 18% in the UK, 16% in the US and 11% in APAC).

US contracting norms in relation to unlimited supplier liability for gross negligence are beginning to be reflected in the contracts of other common law jurisdictions.

The survey data suggests that some US contracting norms are beginning to catch on elsewhere. Take gross negligence, for example. US contracts provide for unlimited supplier liability for gross negligence in 42% of cases. American law recognises the concept of gross negligence. For many years many other common law jurisdictions saw no distinction between negligence and gross negligence. Negligence was negligence, whether gross or not.

However, some common law jurisdictions have begun to recognise the concept in some contexts (particularly when used in contracts), often taking the view that its meaning is a question of contractual interpretation in each case.[4]

The concept often appears in contracts that have been adapted from US law – for example, English law contracts based on a US template. It is perhaps no surprise, therefore, that the survey data shows that 23% of UK contracts now provide for unlimited supplier liability for gross negligence.

% of contracts containing supplier unlimited losses (US)

5%	No unlimited losses
63%	Breach of confidentiality/confidence (including an indemnity)
63%	IP infringement
16%	Data loss/corruption/unauthorised disclosure/ breach of data protection or security (including an indemnity)
5%	Cannot be limited/excluded by law
37%	Fraud/fraudulent statement/fraudulent misrepresentation
74%	Deliberate/wilful abandonment/wilful misconduct
42%	Gross negligence
0%	Wrongful termination
21%	Death/personal injury
16%	Property damage
11%	Obligations to pay fees/service credits/liquidated damages
58%	Other

4 *Camerata Property Inc v Credit Suisse Securities (Europe) Ltd* [2011] EWHC 479 (Comm), paragraph 161.

Few contracts specifically disapply liability caps to service credits and liquidated damages. Contracts should ideally address the issue explicitly one way or the other.

It is consistent with the UK's granular approach to liability for losses that UK contracts (27%), more than any other region (21% across all regions), often specifically provide that the supplier's liability to pay service credits and liquidated damages is unlimited. Many contracts are silent on the issue.

Whatever is agreed commercially between the parties on the issue, it would be preferable if the matter were specifically addressed one way or the other for certainty (see our briefing on this issue, Triple Point Technology Inc v PTT Public Company Ltd: the UK Supreme Court provides clarity for the operation of liquidated damages clauses in construction, commercial and technology contracts).

The APAC region occupies a hybrid position between the very granular approach of UK contracts and more general approach of US contacts in relation to providing for unlimited supplier liability for particular losses.

There are some exceptions to the hybrid position of APAC contracts in relation to providing for unlimited supplier liability for particular losses (sitting between UK's granular approach, on the one hand, and the US's more general approach, on the other). The survey shows that APAC contracts more closely track the US position in relation to unlimited supplier liability for:

- Wrongful termination.
- Death and personal injury.

% of contracts containing supplier unlimited losses (APAC)

20%	No unlimited losses
57%	Breach of confidentiality/confidence (including an indemnity)
54%	IP infringement
11%	Data loss/corruption/unauthorised disclosure/ breach of data protection or security (including an indemnity)
20%	Cannot be limited/excluded by law
26%	Fraud/fraudulent statement/fraudulent misrepresentation
26%	Deliberate/wilful abandonment/wilful misconduct
14%	Gross negligence
3%	Wrongful termination
12%	Death/personal injury
31%	Property damage
11%	Obligations to pay fees/service credits/liquidated damages
20%	Other

What has changed since our 2015 survey?

- In the 2015 survey suppliers in contracts with financial institutions were able to exclude liability for loss or corruption of data in under 10% of cases (they were a bit more successful in other industries).
- A comparison with the current survey data suggests that what is typically more determinative now is not so much the industry at issue, but the customer's *location and applicable law* – if the GDPR applies, for example, then a contract will more readily not exclude supplier liability for loss or corruption of data. In the current survey no suppliers were successful in excluding liability for loss or corruption of data in UK contracts. With a range of other countries and states enacting privacy legislation (for example, California's *Consumer Privacy Act*), supplier liability for loss or corruption of data will increasingly come into focus in negotiations across the globe.
- A comparison between the two surveys also suggests that contracts are now treating data issues with more *granularity* in relation to liability – for example, nowadays they typically do not simply address loss or corruption of data in isolation, but also address breach of data privacy rules, breach of confidentiality and breach of security.

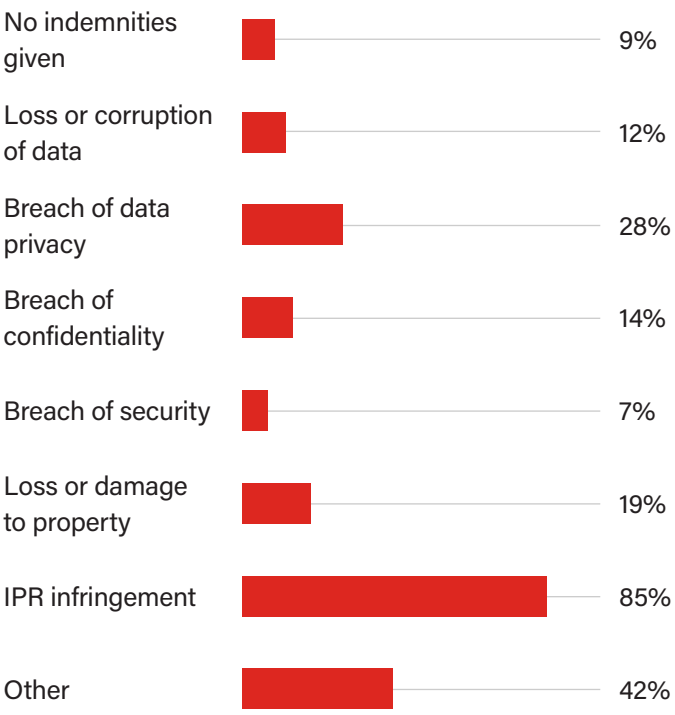
What is current practice in relation to suppliers giving indemnities?

Supplier indemnities are most common in US contracts when compared with the practice in all regions.

To what extent do suppliers give indemnities across the regions surveyed?

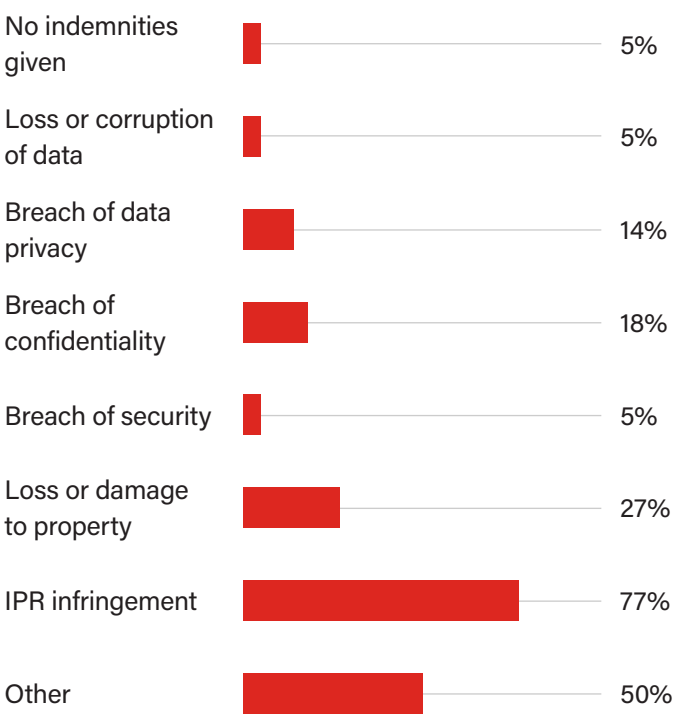
Across the regions surveyed, most suppliers (85%) give an IPR indemnity:

% of contracts with supplier indemnities (all regions)



Indemnities are more common in US contracts, with 9% of contracts across all regions containing no supplier indemnities, while just 5% of US contracts contain no supplier indemnities:

% of contracts with supplier indemnities (US)

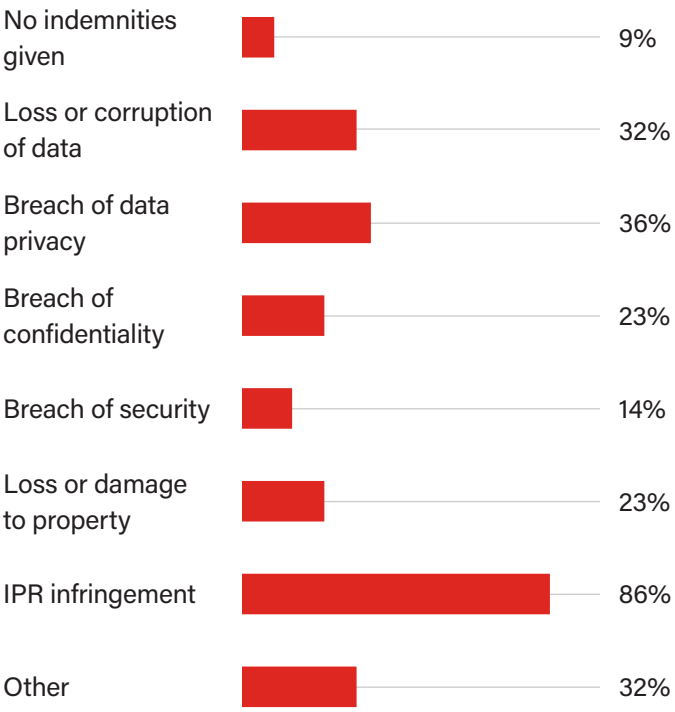


Compared with all the regions taken as an average, UK contracts typically include more supplier indemnities relating to data issues.

Unsurprisingly, given the impact of the GDPR, compared with all the regions taken as an average, UK contracts typically include more supplier indemnities relating to data issues:

Supplier indemnity for :	UK contracts	US contracts	APAC contracts
Loss or corruption of data	32%	5%	3%
Breach of data privacy rules	36%	14%	37%
Breach of confidentiality	23%	18%	6%
Breach of security	14%	5%	3%

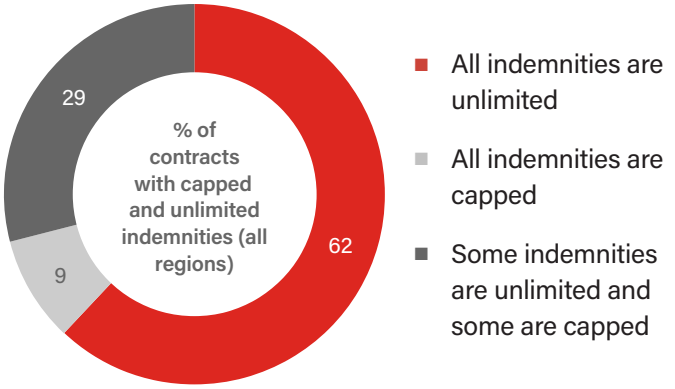
% of contracts with supplier indemnities (UK)



To what extent do suppliers typically cap liability for the indemnities they give?

Just 9% of suppliers across all regions cap liability for all the indemnities they give.

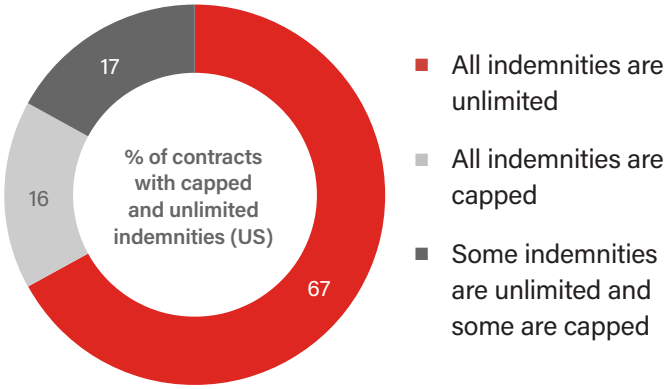
Across all the regions surveyed, suppliers typically agree to liability for all the indemnities they give being unlimited in 62% of cases. Just 9% of cases cap liability for all indemnities.



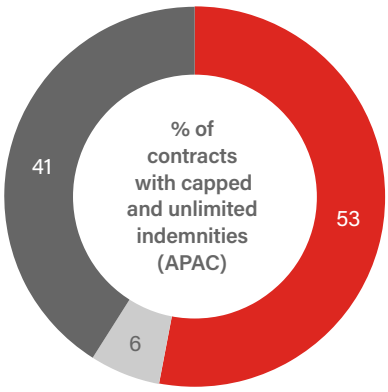
Compared with all regions surveyed, suppliers in US contracts prefer *consistency of approach* in relation to having unlimited liability for indemnities, on the one hand, or capped liability for indemnities, on the other. They take one approach or the other more consistently, when compared with all regions surveyed.

The approach to capping supplier liability for indemnities is distinctly different in the US, when compared to all regions surveyed. Suppliers in US contracts are more likely than elsewhere to agree that liability for all indemnities is unlimited, on the one hand, or that liability for all indemnities is capped, on the other. The data therefore show that they more readily prefer *consistency of approach* in relation to this issue across all indemnities, when compared with suppliers in other regions.

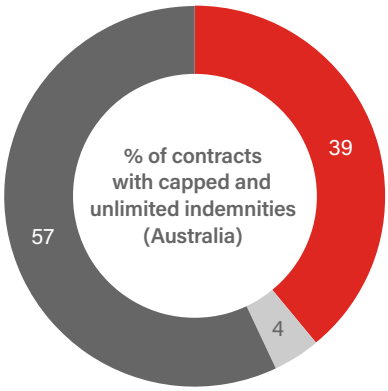
Accordingly, just 17% of suppliers in US contracts apply a variable approach to capping liability for indemnities (depending on the indemnity at issue), compared with 30% in UK contracts and 41% in APAC contracts who took this approach.



The APAC region (and in particular Australia) takes the most varied approach to capping supplier liability for indemnities, with 41% of suppliers in APAC contracts and 57% of suppliers in Australian contracts capping liability for some but not all indemnities (compared with 30% in UK contracts and just 17% in US contracts who took this approach).



- All indemnities are unlimited
- All indemnities are capped
- Some indemnities are unlimited and some are capped

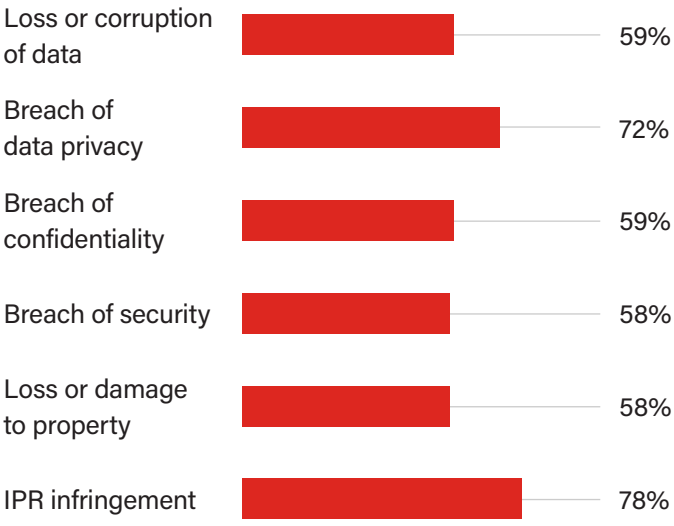


- All indemnities are unlimited
- All indemnities are capped
- Some indemnities are unlimited and some are capped

What indemnities are suppliers typically willing to give on an unlimited liability basis?

Across all regions a supplier indemnity for IPR infringement is the most likely to be unlimited as to liability (78%), followed by a supplier indemnity for breach of data privacy laws (72%).

% of contracts with uncapped supplier indemnities (all regions):



While the data survey shows that suppliers in US contracts typically give more indemnities (when compared with all regions), they are far less likely (when compared with all regions) to be given with uncapped liability.

There is marked divergence of approach to agreeing uncapped supplier liability for indemnities across the regions surveyed:

Uncapped supplier liability in relation to indemnity for:	US contracts	UK contracts	APAC contracts
Loss or corruption of data	16%	73%	49%
Breach of data privacy laws	16%	73%	80%
Breach of confidentiality	16%	68%	49%
Breach of security	16%	68%	49%
Damage to property	21%	64%	49%
IPR infringement	26%	86%	77%

Overall, therefore, the survey data reveals that US contracts in general take a very different approach to indemnification when compared with all regions. Why is this? It may be as simple as a *quid pro quo* equation: the supplier under a US contract typically gives more indemnities, but on the basis that liability under them is capped.

What has changed since our 2015 survey?

- The 2015 survey showed that generally between 33% – 34% of suppliers gave an indemnity for loss or corruption of data across all sectors.
- In the current survey, the data shows that this varies according to region. Suppliers give an indemnity for loss or corruption of data as follows: UK contracts 32%, US contracts 5%, APAC contracts 3%.

The future

The impact of the GDPR on contracting norms, revealed by the survey, points to a broader question when benchmarking contractual norms globally. It may well be possible that regulatory initiatives in the future may be an even greater influence on global divergence of technology contracting norms than is the case currently.

For example:

- The EU's Proposed Regulation on digital operational resilience for the EU financial sector, which is part of a broader EU Digital Finance Strategy package, is a first European-level legislative initiative aiming to introduce a harmonised and comprehensive framework on digital operational resilience for European financial institutions. When formally adopted, the regulation will also bring critical third-party service providers – such as cloud computing services – within direct oversight of the European supervisory authorities. Outsourcing, cloud, and technology contracts with banks and other financial institutions are likely to reflect its requirements.
- The draft EU AI Regulation has implications for contracts under which artificial intelligence is developed or licensed. It is possible that the regulation's impact may override other commercial imperatives as regards risk allocation in technology contracts. For more information on the regulation, see EU proposes new Artificial Intelligence Regulation.
- The Australian Prudential Regulation Authority (**APRA**) Prudential Standard CPS 234 requires that APRA-regulated entities (e.g. banks) take measures to be resilient against information security incidents (including cyber-attacks) by maintaining an information security capability commensurate with information security vulnerabilities and threats. This has already resulted in banks and other financial institutions taking comprehensive and robust approaches when it comes to outsourcing, cloud and technology contracts.

This survey, conducted in 2021, shows significant changes since we conducted the last survey in 2015. As our next step, based on the 2021 data, we will be publishing a follow-on report showing trends revealed in comparing data points between the *different kinds of contracts* we reviewed (outsourcing, professional services, software (on-premises), software-as-a-service (SaaS), cloud and hardware contracts).

Data-driven negotiations

We will continue to augment our database with data from new contracts so that it can enable us to undertake negotiations informed by the data, and to deliver market-benchmarked and brokered contractual positions for our clients.

What is our methodology?

The survey covers outsourcing, professional services, software (on-premises), software-as-a-service (SaaS), cloud and hardware contracts entered into between 2016 and 2021.

The contracts in scope relate to customers based in US, UK, UAE, Thailand, Switzerland, South Africa, Singapore, Japan, Germany, France, China, Canada, Brazil, Austria and Australia.

What was the split between contracts where we acted for the customer or the supplier?

Most of the contracts within the survey (77% across all regions) are contracts in respect of which we acted for the customer:

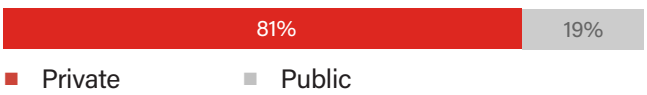
% of contracts where we acted for customer v supplier (all regions)

We acted for a larger number of suppliers (37%, as opposed to the average of 23% across all regions) in the case of US contracts within the survey. The data is not granular enough to reveal outcomes turning on such differences.

What was the percentage split between public and private sector contracts in the survey?

Across all regions 81% of the contracts within the survey are private sector contracts:

% of contracts for public sector v private sector (all regions)

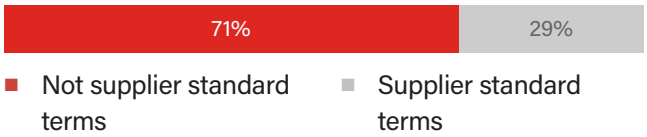


There is significant regional variation. For example, all US contracts we reviewed are private sector contracts, while in APAC just 54% of contracts are private sector. In the case of Australia, only 37.5% contracts are private sector contracts, with the majority (62.5%) being public sector contracts.

What percentage of contracts are on supplier standard terms?

Across the regions only 29% of contracts within the survey are on supplier standard terms:

% of contracts where supplier standard terms were used (all regions)



Australia has the lowest percentage of contracts on supplier standard terms (12.5%), which shows a proactive stance by Australian customers when it comes to procuring and engaging service providers.

However, 47% of US contracts are on supplier standard terms, which may explain why a significant number of US contracts (29%) cap supplier liability at less than 100% of fees (see *'What is current market-standard in relation to liability caps?'*).

Has anything changed in the methodology since our 2015 survey?

Because our 2015 survey and the current one do not compare "like for like" in all respects (for example, the regions surveyed differ slightly, as do the types of contracts within scope), observations about changes between 2015 and now are based less on an analysis of statistical differences and more on marked trends.

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